IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

STATE V. KIBBEE

STATE OF NEBRASKA, APPELLEE,
V.
EDDIE R. KIBBEE, APPELLANT.

Filed July 3, 2012. No. A-11-358.

Appeal from the District Court for Nuckolls County: VICKY L. JOHNSON, Judge. Affirmed.

James R. Mowbray and Jerry L. Soucie, of Nebraska Commission Public Advocacy, for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

MOORE and PIRTLE, Judges, and CHEUVRONT, District Judge, Retired.

PIRTLE, Judge.

INTRODUCTION

Following a jury trial in the district court for Nuckolls County, Eddie R. Kibbee was found guilty of first degree sexual assault on a child in violation of Neb. Rev. Stat. § 28-319 (Reissue 2005). On appeal, Kibbee asserts the district court erred in overruling his objection to generalities in the testimony presented and in overruling his motion for new trial. For the reasons that follow, we affirm.

BACKGROUND

Kibbee was charged by information in the district court for Nuckolls County with one count of first degree sexual assault on a child. It was alleged that Kibbee, being 19 years of age or older, subjected J.V., being less than 16 years of age, to sexual penetration between February 2, 2002, and January 11, 2006.

J.V. was born in March 1998 and lived with his mother, but had no contact with his biological father. Kibbee dated J.V.'s mother, and they lived together with J.V. from the time J.V. was in preschool until fourth grade. J.V.'s cousin, her husband, and their daughter lived next door. Kibbee worked as a truckdriver and would bring home gifts to J.V. every Friday when he returned from the road. Kibbee sometimes returned on Fridays before J.V.'s mother returned home from work, and J.V. would be home alone with Kibbee.

A jury trial was held on the charge against Kibbee on March 15 through 17, 2011. J.V. testified on direct examination that Kibbee sexually assaulted him in "probably about first or second" grade. He testified that his cousin's daughter was about 1 year old at that time and that he thought she was born in March 2003. On cross-examination, he testified that the assault happened during the summer "[b]etween first and second grade."

On the day of the assault, Kibbee was at home alone with J.V. and told him to go into the bathroom and get undressed. J.V. testified that he thought he was going to take a bath so he did as Kibbee requested, but then Kibbee told him to return to his bedroom. J.V. saw that Kibbee was in the living room, naked, and once they were both in the bedroom, Kibbee penetrated J.V. anally and orally. Kibbee stopped the assault when they heard a car door shut next door, and Kibbee told J.V. that he would kill him if he told anyone about the assault.

Kibbee left J.V.'s mother in January 2006, and he returned to the area in November, stopping on many occasions to retrieve his possessions when J.V. was at home. J.V.'s mother testified that she saw him driving around the area "[c]onstantly." Eventually, after Kibbee was no longer living with J.V. and his mother, J.V. told his uncle about Kibbee and the assault. The conversation started because J.V. was caught fondling a 7-year-old girl. J.V.'s uncle said J.V. began to cry and told him that "[i]f you love somebody, you have to show them," and then he described how Kibbee started fondling him. J.V. told his uncle it began in Kibbee's truck and "then it went from there." J.V.'s uncle told his wife, and then eventually J.V.'s mother was told. J.V.'s uncle testified that J.V.'s cousin and her husband, as well as J.V.'s mother, called J.V.'s uncle a liar. The wife of J.V.'s uncle testified that they did not believe J.V.'s uncle because J.V. denied telling his uncle. J.V.'s mother also testified that she talked to J.V. about what he told his uncle and that J.V. denied it.

A protection and safety worker with the Nebraska Department of Health and Human Services testified at trial. She said for child abuse or neglect cases, an individual may call the department's hotline number and make a report or contact law enforcement and then law enforcement contacts the department. The department received five intakes regarding J.V. between October 2002 and November 2007. The worker testified that based upon her training and experience, there may be multiple intakes on one family before there is a substantiated case because oftentimes a child discloses in piecemeal to "test the waters" and see if he or she will be believed. She said that "[m]ore often than not," it takes more than one intake before there is a substantiated sexual assault case, and that "[q]uite often," a delayed report is involved in a sexual assault investigation.

J.V. had frequent problems at school, and his teachers testified that he had a mild mental handicap and showed signs of attention deficit hyperactivity disorder (ADHD). He also had intermittent problems with bowel movements and bladder control in school. The teachers testified that these problems are often signs and symptoms of abused children. One teacher kept a

log of when J.V. had bowel or bladder problems and wrote a note to the principal with concerns that there was "more to it than just a bowel movement."

J.V. first saw Dr. Julie Thies for an ADHD consultation in October 2003. She determined he had severe ADHD and prescribed various medications to control his symptoms. In November 2003, she saw J.V. for encropresis, or leaking of the stool. She explained that encropresis can be caused by increased stressors in an individual's life or chronic constipation, but she was not able to determine the cause in J.V. She performed two rectal examinations on him and did not find any abnormalities, but in her opinion, it was possible to have no abnormalities after being anally penetrated. In June 2004, Dr. Thies added a diagnosis of oppositional defiant disorder because of J.V.'s behavior problems with his mother. In April 2005, J.V. had surgery because he had fluid surrounding his testicle, and Dr. Thies testified that this could have been the result of trauma or that it could have just happened. Dr. Thies testified that J.V. never told her he had been sexually abused by anyone. She testified that based upon her training and experience, a child who has been sexually assaulted may not disclose to a doctor because they fear various repercussions.

J.V. also was a patient of Dr. Susan Howard from June 2004 to December 2005. Dr. Howard treated J.V. for ADHD and oppositional defiant disorder. She identified side effects of his medication for those issues to be facial and neck tics, but he did not show any signs of psychosis, delusions, or hallucinations. She testified about her training and experience in the area of child sexual assaults and opined that it could be a sign of sexual abuse if a child acts out sexually at an early age. Dr. Howard explained that based upon her training and experience, there were multiple reasons why a child would not feel comfortable disclosing a sexual assault to a doctor. She said that sometimes internal factors, such as significant behavior or attention problems, interfere with the child's ability to have a conversation. Other times, nondisclosure is a result of trust issues, fear the child will get in trouble or taken away, fear the child's family will split up, or the child's having been threatened not to say anything. She testified that nondisclosure is not at all uncommon.

Maja Cartwright is a forensic interviewer who conducts interviews of children who have allegedly been abused. Cartwright interviewed J.V. on September 11, 2009, and she testified that she asked him questions according to protocol and in a nonleading manner. Cartwright testified she had been trained on delayed disclosure by children, and she described reasons why a child may not disclose abuse right away. These reasons included threats from the abuser, fear of the reactions of others, and fear of hurting the child's family.

Cartwright also testified that she had been trained about the term "grooming" as it relates to sexual abuse. She said grooming is "where the offender grooms the child into the sexual behavior" by attracting a child in different ways, and then the offender eventually turns to sexual touching or sexual assault. Cartwright stated one example of grooming is buying children special gifts. Cartwright did not testify regarding her opinion on whether J.V. had been sexually assaulted, and she did not connect her knowledge of grooming or delayed disclosure to the facts of this case.

The jury found Kibbee guilty of first degree sexual assault on March 17, 2011. Kibbee timely filed a motion for new trial, which was overruled. The district court sentenced Kibbee to 30 to 40 years' imprisonment. Kibbee was also required to register under Nebraska's Sex Offender Registration Act.

ASSIGNMENTS OF ERROR

Kibbee's assignments, consolidated and restated, are that the district court erred when it overruled his objection to generalities in the testimony presented and when it overruled his motion for new trial.

STANDARD OF REVIEW

The standard for reviewing admissibility of expert testimony is abuse of discretion. *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011).

In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Nelson*, 282 Neb. 767, 807 N.W.2d 769 (2011).

ANALYSIS

Objection to State's Evidence.

Kibbee argues it was an error to allow the State's forensic interviewer, Cartwright, to testify about "non-specific generalities related to child late reporting and perpetrator grooming behavior." He argues that her testimony, represented as foundational, was misleading to the jury and was irrelevant and prejudicial.

In *State v. Roenfeldt*, 241 Neb. 30, 486 N.W.2d 197 (1992), the Nebraska Supreme Court held expert testimony about symptoms, behavior, and feelings generally exhibited by children who have been sexually abused was relevant in assisting a trier of fact in understanding and determining the issue of whether the defendant had sexually assaulted the victim. The court stated the reasoning for the rule allowing an expert to testify in generalities, without being familiar with the alleged victim, is that "'[f]ew jurors have sufficient familiarity with child sexual abuse to understand the dynamics of a sexually abusive relationship,'" and "'the behavior exhibited by sexually abused children is often contrary to what most adults would expect.'" *Id.* at 39, 486 N.W.2d at 204.

Kibbee argues that because there is a barrage of information about sexual abuse disseminated to the public, the average juror is now more aware of the dynamics. Essentially, Kibbee argues the *Roenfeldt* decision is outdated and should not apply. While the average juror might be more aware of the existence of sexual abuse than 20 years ago, it does not mean they are fully versed in the behavior exhibited by sexually abused children after the fact.

In *Roenfeldt*, the court noted the expert did not testify to an opinion on whether the victim had been sexually abused, nor did she attest to the likelihood of the victim's veracity or truthfulness. The Nebraska Supreme Court recently applied the same reasoning as the *Roenfeldt* court when it held expert testimony was properly allowed when it contained generalities regarding child witnesses where the expert did not opine whether the children had been abused or whether she believed the allegations. *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010).

Similarly, in this case, Cartwright testified in generalities. She stated that in most cases, children do not disclose instances of sexual abuse right away, and she provided reasons for delayed disclosure. She defined the term "grooming" and gave examples of grooming, for example, buying a child special gifts. Though she did interview J.V. regarding the alleged sexual abuse, she did not connect the facts of this case or her observations regarding J.V. to the general

information about sexual abuse cases. Doing so would have been contrary to the Nebraska Supreme Court's rulings in *Roenfeldt, supra*, and *Fleming, supra*. The standard for reviewing admissibility of expert testimony is abuse of discretion. *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011). Cartwright's testimony stayed within the bounds of relevant case law, and it was not an abuse of discretion to allow this testimony at trial.

Motion for New Trial.

Kibbee assigns that the district court erred when it overruled his motion for new trial on the grounds of prosecutorial misconduct and sufficiency of the evidence.

In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Nelson*, 282 Neb. 767, 807 N.W.2d 769 (2011).

First, we will consider Kibbee's assignment of error regarding prosecutorial misconduct. Kibbee asserts that the prosecutor improperly connected the general, nonspecific testimony of the witnesses at trial to the facts of this case and that therefore, he was entitled to a new trial and the court erred in overruling the motion for new trial.

It is not an abuse of discretion to overrule a motion for new trial that is based on errors alleged to have occurred during trial, but to which no timely objection was made. *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005). In order to preserve, as a ground of appeal, an opponent's misconduct during closing argument, the aggrieved party must have objected to improper remarks no later than at the conclusion of the argument. *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006). Any objection to a prosecutor's arguments made after the jury has been instructed and has retired is untimely and will not be reviewed on appeal. *Id.* A party who fails to make a timely motion for mistrial based on prosecutorial misconduct waives the right to assert on appeal that the court erred in not declaring a mistrial due to such prosecutorial misconduct. *Id.*

Kibbee argues that the prosecutor committed misconduct during her closing argument. However, Kibbee did not object and did not move for a mistrial. Kibbee's failure to object at the close of argument waived his right to object on appeal, and therefore, we do not consider this assignment of error with regard to the existence of prosecutorial misconduct.

Next, we consider whether, as Kibbee stated, the testimony of J.V. was so lacking in credibility and independent corroboration that the district judge should have granted the defense motion for a new trial.

When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Hudson*, 279 Neb. 6, 775 N.W.2d 429 (2009). The appellate court does not resolve conflicts in the evidence, pass on the credibility of the witnesses, or reweigh the evidence. *Id.*

Kibbee argues that the evidence was insufficient to convict him because there was no evidence other than J.V.'s testimony. In his brief, Kibbee cites multiple issues with J.V.'s testimony, calling the credibility of J.V. as a witness into question.

In any criminal case, any conflicts in the evidence or questions concerning the credibility of the witnesses are for the finder of fact to resolve. *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009). Further, Neb. Rev. Stat. § 29-2028 (Reissue 2008) provides that "[t]he testimony of a person who is a victim of a sexual assault as defined in sections 28-319 to 28-320.01 shall not require corroboration." As such, uncorroborated testimony is sufficient to convict a defendant in any case wherein the fact finder determined that such testimony was sufficient evidence of guilt beyond a reasonable doubt. *State v. Luff*, 18 Neb. App. 422, 83 N.W.2d 632 (2010).

Kibbee argues there is no physical or forensic evidence, corroborating testimony from other witnesses, or admission from Kibbee to support his conviction of first degree sexual assault on a child. However, under Nebraska law, none of this evidence is required to support a conviction.

The evidence shows Kibbee lived in the home with J.V. and his mother from 2002 to 2006. J.V. was left alone with Kibbee, and Kibbee repeatedly bought toys for J.V., often after his mother disciplined him by taking his toys away. J.V. testified that the charged sexual assault occurred when he was in first or second grade, in either 2004 or 2005, and that it was not the first time Kibbee had sexually touched him.

J.V. testified that on the day of the charged assault, Kibbee told him to undress and go into his bedroom and Kibbee penetrated him anally and orally. J.V. said that Kibbee stopped the assault when they heard a car door shut next door and that Kibbee said he would kill J.V. if he told anyone about the assault. J.V. eventually disclosed the details of the assault to his uncle, after J.V. was caught fondling a 7-year-old girl. J.V. cried and told his uncle that Kibbee had started out fondling him and "then it went from there." He said he had fondled the girl because "[i]f you love somebody, you have to show them." J.V. told his uncle the incidences with Kibbee began in Kibbee's truck and had been going on for a while. J.V.'s uncle told his wife about what J.V. had said, and eventually J.V.'s mother was told. When J.V.'s mother talked to J.V., he denied it. Similarly, J.V. did not disclose any incidences of sexual assault to his doctors.

The jury heard evidence from multiple witnesses regarding delayed disclosure by children, including reasons why most do not disclose right away, the feelings they have after they disclose, how to help them after they disclose, and the reactions of others to the disclosure. The jury also heard testimony about "grooming," acts or gifts which groom the child into sexual behavior.

It is true that there is some uncertainty regarding the date of the assault; however, given J.V.'s age at the time of the assault and the fact that he testified several years after the alleged assault, this uncertainty is understandable. Viewing his testimony, the expert testimony, and the testimony of the other adults in J.V.'s life in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. We find it was not an abuse of discretion to overrule the motion for new trial for insufficiency of the evidence.

CONCLUSION

We find the district court did not abuse its discretion in allowing the testimony of Cartwright with generalities regarding child sexual abuse. We do not consider the existence of prosecutorial misconduct, as Kibbee waived his objection at trial. Further, we find the district

court did not abuse its discretion in overruling Kibbee's motion for new trial citing insufficiency of the evidence. We affirm.

AFFIRMED.